No. 14-593

Title:	Torrey Dale Grady, Petitioner
	v.
	North Carolina
Docketed:	November 21, 2014
Lower Ct:	Supreme Court of North Carolina
Case Nos.:	(179P14)
Decision Date:	August 19, 2014

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 17 2014	Petition for a writ of certiorari filed. (Response due December 22, 2014)
Dec 10 2014	Waiver of right of respondent North Carolina to respond filed.
Dec 17 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 5 2015	Response Requested . (Due February 4, 2015)
Feb 4 2015	Brief of respondent North Carolina in opposition filed.
Feb 18 2015	DISTRIBUTED for Conference of March 6, 2015.
Feb 18 2015	Reply of petitioner Torrey Dale Grady filed. (Distributed)
Mar 9 2015	DISTRIBUTED for Conference of March 20, 2015.
Mar 23 2015	DISTRIBUTED for Conference of March 27, 2015.
Mar 30 2015	Petition GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
May 1 2015	MANDATE ISSUED.

14-593

In The
Supreme Court of the United States

TORREY DALE GRADY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

Lewis M. ("Luke") Everett
Everett & Everett, Attorneys at Law
2812 Erwin Rd., Suite 205
Durham, NC 27705
T: 919-382-2800
e-mail: luke@everettandeverett.com

Mark L. Hayes
Law Office of Mark L. Hayes
P.O. Box 51387
Durham, N.C. 27717
T: 919-926-7878
email: markhayes@appealnc.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Does the State of North Carolina perform an unconstitutional search when it requires a citizen to wear a GPS monitoring ankle bracelet for the rest of his life based only on the citizen's status as a recidivist sex offender and where there is no finding that he is a threat to society?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 15

APPENDIX

Denial of Petition for Discretionary Review by the Supreme Court of North Carolina (Aug. 19, 2014) 1a

Opinion denying Petitioner's Appeal by the Court of Appeals of North Carolina (May 6, 2014) 3a

Judicial Findings and Order as to Satellite-Based Monitoring When There Has Been No Prior Determination (May 14, 2013) 8a

TABLE OF AUTHORITIES

CASES

Berger v. New York, 388 U.S. 41 (1967) ..... *passim*

Boyd v. United States, 116 U.S. 616 (1886) 8

Cupp v. Murphy, 412 U.S. 291 (1973) 6

Delaware v. Prouse, 440 U.S. 648 (1979) 8

Florida v. Jardines, 133 S. Ct. 1409 (2013) 5

Griffin vs. Wisconsin, 483 U.S. 868 (1987) 11

Katz v. United States, 389 U.S. 347 (1967) 8

Maryland v. King, 133 S. Ct. 1958 (2014) 6

New Jersey v. T.L.O., 469 U.S. 325 (1985) 7

Oliver v. United States, 466 U.S. 170 (1984) 6

Riley v. California, 134 S. Ct. 2473 (2014) ..... *passim*

Samson v. California, 547 U.S. 843 (2006) 11

Schmerber v. California, 384 U.S. 757 (1966) 6

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 6

State v. Bowditch, 364 N.C. 334 (Hudson, J, dissenting) 12

State v. Jones, 750 S.E.2d 883 (N.C. App. 2013) 7

United States v. Jones, 132 S. Ct. 945 (2012) 6, 7

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 7

CONSTITUTION, STATUTES, REGULATIONS and RULES

U.S. Const. amend. IV 2, 5

28 U.S.C. § 1257(a) 1

N.C. Gen. Stat. § 14-208.40 ..... 2, 5

N.C. Gen. Stat. § 14-208.40B 3

N.C. Gen. Stat. § 14-208.5 10

N.C. H.R. Vote Tran., 2006 Reg. Sess. H.B. 1896 14

Sup. Ct. R. 13.3 1

OTHER AUTHORITIES

Ariana Green, *More States Use GPS to Track Abusers*, N.Y. Times, May 8, 2009 14

Eric Dante, Tracking the Constitution—*the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 Seton Hall L. Rev. 1169, 1172-92 14

N.C. Gov.'s Mess. (Aug. 16, 2006) 15

Robert A. Barton, et al., *Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions* at 6 (October 2014) 12, 13

Scott Mooneyham, *A Political Ad Too Far*, Asheville Citizen-Times, April 29, 2014 15

"Sex Offender Information Overview," California Department of Corrections and Rehabilitation webpage 14

Stephen Gies, et al., *Monitoring High-Risk Gang Offenders with GPS Technology: An Evaluation of the California Supervision Program Final Report* (Sept. 30, 2013) 14

Petitioner Torrey Grady respectfully requests that this Court issue a writ of certiorari to review the opinion entered in this case by the Court of Appeals of North Carolina and the refusal to grant a petition for discretionary review by the Supreme Court of North Carolina.

OPINIONS BELOW

The Supreme Court of North Carolina's denial of the petition for discretionary review (Pet.App. 1a) is published at 762 S.E.2d 460 (N.C. 2014). The opinion of the Court of Appeals of North Carolina (Pet.App. 3a) affirming the superior court's Judicial Findings and Order as to Satellite-Based Monitoring When There has Been No Prior Determination is unpublished, but the disposition appears in a table at 759 S.E.2d 712 (2014). The Superior Court's Findings and Order (Pet.App. 8a) appear in the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the opinion of the Court of Appeals of North Carolina and the denial of the petition for discretionary review of the Supreme Court of North Carolina pursuant to 28 U.S.C. § 1257(a). The denial of petition for discretionary review was entered on August 19, 2014. This petition for writ of certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.C. Gen. Stat. § 14-208.40

(a) The Division of Adult Correction of the Department of Public Safety shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor three categories of offenders as follows:

(1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant . . . is a recidivist . . . .

. . .

(c) The satellite-based monitoring program shall use a system that provides all of the following:

(1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.
(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

. . .

N.C. Gen. Stat. § 14-208.40B

. . .

(b) If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides. . . .
(c) . . .
If the court finds that . . . (ii) the offender is a recidivist, . . . the court shall order the offender to enroll in satellite-based monitoring for life.

STATEMENT OF THE CASE

On May 14, 2013, in a twenty-minute determination hearing before a North Carolina superior court judge, Petitioner Torrey Grady was ordered to enter into an involuntary global positioning system (GPS) monitoring program.

The terms of the program are extreme. For twenty-four hours every day, Petitioner must wear an ankle bracelet that transmits all of his movements and locations to agents of the State. He must maintain a GPS monitoring base station in his home, and State personnel can enter his home—with or without his permission—to maintain it. Petitioner must charge his bracelet daily, which requires him to be plugged into a wall outlet at least once a day for four to six hours at a time. These conditions will be imposed upon Petitioner, in perpetuity, for the rest of his life.

At the time that the determination hearing was held, Petitioner was neither in custody nor on probation. Nor was he under suspicion of having committed a crime. Instead, the hearing was held solely on the basis of two prior convictions against Petitioner: a conviction of second degree sexual offense from 1996 when Petitioner was seventeen years old, and a conviction of indecent liberties with a child from 2005.

At the hearing, there was no consideration of whether Petitioner constituted a threat to society; in fact, there were no facts introduced at all other than the fact of Petitioner's previous convictions. On the form order that sentences Petitioner to satellite-based monitoring "for the remainder of [his] natural

life," the sole individualized finding is that "defendant is a recidivist." Pet.App. 9a.

The monitoring order was granted pursuant to N.C. Gen. Stat. § 14-208.40 *et seq.*, a series of statutes that creates a program of GPS monitoring of convicted sex offenders. The law was enacted after both of Petitioner's prior convictions.

Petitioner appealed the monitoring order. The Court of Appeals of North Carolina denied the appeal in an opinion dated May 6, 2014 (Pet.App. 3a).

Petitioner petitioned for discretionary review from the Supreme Court of North Carolina. That petition was denied on August 19, 2014 (Pet.App. 1a).

REASONS FOR GRANTING THE WRIT

In Finding that the Lifetime GPS Monitoring of Petitioner is Not an Unconstitutional Search, the North Carolina Appellate Courts Decided an Important Federal Question in a Way that Conflicts with this Court's Fourth Amendment Jurisprudence.

A. The State's Lifetime GPS Monitoring of Petitioner Is a Search under the Fourth Amendment.

The Fourth Amendment provides in relevant part that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. By its terms, the Amendment "'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Florida v.*

Jardines, 133 S.Ct. 1409, 1414 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)). Thus, when the State obtains information by physically trespassing on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 132 S.Ct. 945, 950 n.3 (2012) (holding that the use of a GPS device to track a vehicle's movements constitutes a search under the Fourth Amendment).

The first listed "place [or] thing" protected by the Fourth Amendment is the "person," and this Court's jurisprudence has reflected that primary status. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."). "Virtually any intrusion into the human body" is an invasion that is "subject to constitutional scrutiny." *Maryland v. King*, 133 S.Ct. 1958, 1969 (2014) (internal quotations omitted). Thus, this Court has held each of the following to be searches for Fourth Amendment purposes: a buccal swab taken on the inside of a person's cheek, *id.* at 1968-69; police efforts to draw blood, *Schmerber*, 384 U.S. at 767-72; scrapings taken from underneath an arrestee's fingernails, *Cupp v. Murphy*, 412 U.S. 291, 295 (1973); and a breathalyzer test, *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616-17 (1989).

By any reckoning, the monitoring in this case is as invasive a trespass as any that this Court has previously considered. Not only has the State attached itself to Petitioner's body for the rest of his life, but it will also enter his home on an ongoing basis to service the instrument of its surveillance. In

so doing, the State makes direct intrusions onto both Petitioner's "person" and his "house." Such intrusions are undoubtedly searches under the *Jones* trespassory test.

However, the Court of Appeals of North Carolina found that the State did not, in fact, engage in a search of Petitioner with its GPS program. Pet.App. 3a-7a. In response to this Court's recent ruling in *Jones*, the court of appeals found only that Petitioner's case was "readily distinguishable" from *Jones* because the North Carolina program is civil in nature while *Jones* was a criminal case. Pet.App. 7a (relying on *State v. Jones*, 750 S.E.2d 883, 886 (N.C. App. 2013), which held that *U.S. v. Jones* was inapplicable to civil GPS monitoring because it dealt with a criminal search).

The court of appeals provides no authority for the proposition that the State's program might not constitute a search merely because the State has dubbed it a "civil" program. *See* Pet.App. 3a-7a. Nor could it, as this Court has explicitly refused to adopt such an interpretation of the Fourth Amendment. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) ("[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities."). Absent this distinction, it is unimaginable that the State's program is not a search.

B. The State's Lifetime GPS Monitoring of Petitioner is Not Reasonable.

When the State performs a search, the Fourth Amendment requires that search to be reasonable. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646,

652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"). "Reasonableness" usually requires a warrant supported by probable cause, but this Court has carved out "a few specifically established and well-delineated exceptions" to that requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). The question of whether a warrantless search is reasonable is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

While an individual's status may affect this balancing, the Fourth Amendment never "falls out of the picture entirely." *Riley v. California*, 134 S.Ct. 2473, 2488 (2014) (holding that "when privacy-related concerns are weighty enough, a search may require a warrant," even when the individual has diminished expectations of privacy (internal quotations omitted)). Thus, regardless of an individual's status, a search is still unconstitutional if the imposition on the individual significantly outweighs the governmental interest. *See id.* at 2488-95 (finding the search of an arrestee's cell phone records to be unreasonable despite the fact that the arrestee may have reduced privacy expectations).

Every search must also be "carefully circumscribed so as to prevent unauthorized invasions of 'the sanctity of a man's home and the privacies of life.'" *Berger v. New York*, 388 U.S. 41, 58 (1967) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Even a search supported by probable cause is unreasonable if it is "too broad in

its sweep." *Berger*, 388 U.S. at 44. In *Berger*, the Court found a New York statute authorizing eavesdropping to be unconstitutional because (a) the statute failed to describe with particularity the conversations sought; (b) the two-month, 24 hour a day duration of the search was too "long and continuous"; (c) the statute did not set a termination date on the eavesdrop but left that determination to the discretion of police; and (d) the statute's procedure did not require a showing of exigent circumstances. *Id.* at 58-60. The Court issued this ruling despite Government testimony that outlawing these searches would "severely cripple crime detection." *Id.* at 60-62 ("[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement.").

Ultimately, then, a search that is exceedingly broad and intrusive is unconstitutional, even when the subject has reduced privacy expectations and the state has a legitimate governmental interest. *See Riley*, 134 S.Ct. at 2482-95. In *Riley*, the Court considered whether an officer's search of an arrestee's cell phone was a reasonable search incident to arrest. *Id.* The Government argued, *inter alia*, that the search was reasonable because it furthered the Government's legitimate interest of "ensur[ing] officer safety . . . by alerting officers that confederates of the arrestee are headed to the scene." *Id.* at 2485. The Court agreed that there was "undoubtedly a strong government interest in warning officers about such possibilities." *Id.* However, the Government provided "[no] evidence to suggest" that searching cell phones would further that interest of protecting officers. *Id.*

On the other side of the balancing, the Court in *Riley* recognized the privacy concerns implicated by modern cell phones. *Id.* at 2488-91. In the course of a lengthy discussion of the significant role that cell phones now play in the life of the average American, *id.*, the Court wrote that "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Id.* at 2490.

The Court thus balanced the Government's claim that the warrantless search of an arrestee's cell phone furthered a legitimate governmental interest against the significant privacy invasion of such a search. *Id.* at 2495. As in *Berger*, the Court acknowledged that its decision could "have an impact on the ability of law enforcement to combat crime," *id.* at 2493, but nevertheless found the search to be unconstitutional, *id.* at 2495.

In this case, because the State maintained that its GPS monitoring program does not constitute a search—and because the North Carolina appellate courts accepted that contention—the State has not articulated a position on the reasonableness of its program. If pressed, however, the State would almost certainly respond that the "legitimate governmental interest" of protecting its citizens renders the search reasonable. Such protection is named as the purpose of the article in which the statute falls: "[I]t is the purpose of this Article to assist law enforcement agencies' efforts to protect communities . . . ." N.C. Gen. Stat. § 14-208.5 (2013).

Petitioner does not deny that protecting citizens is a "legitimate governmental interest." He also concedes that his status may alter the calculus

of the balancing test as applied to him. However, as his Fourth Amendment rights have not "fall[en] out of the picture entirely," a balancing must still be done between the search's intrusion onto his individual rights and the State's interests. The State and its courts have refused to do so.

Such a balancing is lopsided. While this Court gave great weight to the personal nature of cell phones in *Riley*, the information found by the GPS search here is even more personal, as it includes every move made by Petitioner for the rest of his life. Such information goes to the heart of Petitioner's "privacies of life." Add to that the invasion of the State entering Petitioner's home uninvited, and it is hard to imagine a more intrusive search than that experienced by Petitioner.

The searches are especially intrusive given that Petitioner has fully completed the sentences for his previous crimes. The State does not have an "ongoing supervisory relationship" as it does with a probationer. *See Griffin vs. Wisconsin*, 483 U.S. 868, 879-80 (1987) (finding home searches of probationers constitutional). Nor did he accept these searches as a condition of his release. *See Samson v. California,* 547 U.S. 843, 846 (2006) (finding the search of a parolee who has consented to such a search as a term of his release to be constitutional).

Moreover, the program is in no way "carefully circumscribed." As in *Berger*, the State's GPS monitoring statute fails to specify what sort of information is to be sought, and it requires no exigent circumstances before permitting the State to acquire information about Petitioner. And the GPS monitoring of Petitioner doesn't stop after the two

months that the *Berger* Court found to be "long and continuous"; it continues for the rest of his life.

On the other side of the balancing, little evidence supports the State's contention that GPS monitoring of sex offenders furthers its legitimate governmental interest of protecting the public. When, in 2010, the Supreme Court of North Carolina considered whether the State's GPS monitoring program constituted an ex post facto punishment, the State could provide "no evidence or testimony . . . that the [satellite-based monitoring] program . . . operates to prevent actual harm to our state's children." *See State v. Bowditch*, 364 N.C. 334, 356 (Hudson, J, dissenting). Instead, because enrollees were not subject to any exclusion zones, "no one knows when one of these offenders is actually in a school, or near a child care center, or talking to a neighborhood child, or even has a child in his home, before any harm might befall that child." *Id.*

A recent comprehensive study of sex offender monitoring in California—the first state to enact such statutes and the state that has the most extensive GPS monitoring program—found very little evidence that GPS monitoring prevents crime. *See* Robert A. Barton, et al., *Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions* at 6 (October 2014), available at: http://www.oig.ca.gov/media/reports/Reports/Reviews/OIG_Special_Review_Electronic_Monitoring_of_Sex_Offenders_on_Parole_and_Impact_of_Residency_Restrictions_November_2014.pdf ("The OIG is unaware of any large-scale studies on the effectiveness of GPS as a crime deterrent."). Indeed, the study calls into question "the popular belief that sex offenders have

a high rate of recidivism compared to other types of felons," which is "an underlying premise" to GPS monitoring itself. *Id.* at 18. The study relied on a 2003 U.S. Department of Justice survey of over 9,000 male sex offenders which found that "[c]ompared to non-sex offenders released from state prison, sex offenders had a lower overall re-arrest rate for *any type* of crime (not just sex crimes)." *Id.* (internal quotations omitted; emphasis and parenthetical information in original).

As this Court held in *Riley* and *Berger*, any search must actually further the legitimate governmental interest claimed. Here, as in *Riley*, where the Government could provide no evidence that the warrantless search of cell phones furthered a governmental interest, there is no evidence that the GPS monitoring actually protects citizens. Weighed against the exceptionally invasive nature of lifetime GPS monitoring, that lack of evidence renders the State's search of Petitioner unreasonable and, consequently, unconstitutional.

C. North Carolina's GPS Monitoring Program Raises an Important Federal Question.

As of September 30, 2014, 602 individuals were subject to GPS monitoring in North Carolina. Given that number and the severity of the Fourth Amendment intrusions by the State, the issue presented in this case would merit serious concern even if North Carolina were alone in instituting a program of this sort.

But North Carolina is far from alone. Since 2005, over forty states have enacted laws mandating some form of GPS monitoring for certain convicted

sex offenders. *See* Eric Dante, *Tracking the Constitution—the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 Seton Hall L. Rev. 1169, 1172-92 (detailing the proliferation of GPS monitoring in states across the country). Of those states, eight—including North Carolina—create a system of lifetime monitoring. *Id.* at 1179. In California alone, 9,300 sex offenders are currently being monitored. *See* "Sex Offender Information Overview," *California Department of Corrections and Rehabilitation webpage*, available at http://www.cdcr.ca.gov/parole/sex_offender_facts/index.html.

Moreover, the use of GPS monitoring is expanding to cover populations besides sex offenders. California, for instance, has been monitoring gang members by GPS for nearly a decade. *See* Stephen Gies, et al., *Monitoring High-Risk Gang Offenders with GPS Technology: An Evaluation of the California Supervision Program Final Report* (Sept. 30, 2013), available at: https://www.ncjrs.gov/pdffiles1/nij/grants/244164.pdf. And at least thirteen states have created GPS monitoring programs for domestic abusers. *See* Ariana Green, *More States Use GPS to Track Abusers*, N.Y. Times, May 8, 2009, at A10.

Legislators or even state judiciaries are unlikely to stand in the way of public pressure to implement GPS monitoring. When the North Carolina legislature first created the GPS monitoring system in 2006, the vote by the state House of Representatives was 108 to zero. N.C. H.R. Vote Tran., 2006 Reg. Sess. H.B. 1896. The Governor signed the bill into law, saying in an executive message, "This legislation ensures that North

Carolina has among the toughest laws in the country . . . ." N.C. Gov.'s Mess. (Aug. 16, 2006). And when, in 2010, Justice Robin Hudson of the Supreme Court of North Carolina wrote in a dissent that North Carolina's GPS monitoring program constituted an ex post facto punishment, she became the subject of a television ad campaign accusing her of "siding with child molesters." *See* Scott Mooneyham, *A Political Ad Too Far*, Asheville Citizen-Times, April 29, 2014.

As GPS surveillance technology advances, the public will continue to demand its use in more—and more intrusive—searches. This Court must make certain that such searches comport with the requirements of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner requests the Court to grant his petition for a writ of certiorari.

Respectfully submitted.

Lewis M. ("Luke") Everett
Luke Everett
Everett & Everett, Attorneys at Law
2812 Erwin Rd., Suite 205
Durham, NC 27705
T: 919-382-2800
e-mail: luke@everettandeverett.com

Mark L. Hayes
Law Office of Mark L. Hayes
P.O. Box 51387
Durham, N.C. 27717
T: 919-926-7878
email: markhayes@appealnc.com

No. _____

In The
Supreme Court of the United States

TORREY DALE GRADY,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

APPENDIX

Lewis M. ("Luke") Everett
Everett & Everett, Attorneys at Law
2812 Erwin Rd., Suite 205
Durham, NC 27705
T: 919-382-2800
e-mail: luke@everettandeverett.com

Mark L. Hayes
Law Office of Mark L. Hayes
P.O. Box 51387
Durham, N.C. 27717
T: 919-926-7878
email: markhayes@appealnc.com

Counsel for Petitioner

762 S.E.2d 460 (Mem)
Supreme Court of North Carolina.
STATE of North Carolina
v.
Torrey Dale GRADY.
No. 179P14.
Aug. 19, 2014.

Attorneys and Law Firms

Mark L. Hayes, for Grady, Torrey Dale.
Joseph Finarelli, Special Deputy Attorney General, for State of North Carolina.
Ben David, District Attorney, for State of North Carolina.

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant on the 5th of June 2014 in this matter pursuant to G.S. 7A–30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the State of NC, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 19th of August 2014."

Upon consideration of the petition filed on the 5th of June 2014 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A–31,

the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 19th of August 2014."

NO. COA13-958
NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2014

STATE OF NORTH CAROLINA

v. New Hanover County
No. 06 CRS 52283
TORREY GRADY, Defendant.

Appeal by defendant from order entered 14 May 2013 by Judge Reuben F. Young in New Hanover County Superior Court. Heard in the Court of Appeals 17 March 2014.

Roy Cooper, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State.

Mark L. Hayes, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Torrey Grady appeals from the trial court's order requiring him to enroll in a satellite-based monitoring ("SBM") program for the duration of his natural life. We affirm.

On 13 September 2006, defendant was convicted upon a guilty plea of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1. On 15 March 2010, defendant acknowledged receipt of a letter from the North Carolina Department of Correction notifying him to appear at an SBM determination hearing. The letter informed defendant that the Department made an initial

determination that he met the criteria of a recidivist based on a prior 1997 conviction in New Hanover County of second-degree sexual offense, and notified him to appear at the SBM determination hearing so that the trial court in his county of residence could make a determination as to whether defendant "shall be required to enroll in [SBM]."

The trial court conducted defendant's SBM determination hearing on 14 May 2013 in accordance with N.C.G.S. § 14-208.408, during which it also considered defendant's "Motion to Deny [SBM] Application and Dismiss Proceeding," filed almost one week earlier. In the motion and at the hearing, defendant's counsel argued that SBM violated defendant's constitutional right to be free from unreasonable searches and seizures. The trial court denied defendant's motion to dismiss the SBM determination proceeding, determined that defendant qualified as a recidivist, and ordered defendant to enroll in SBM for the remainder of his natural life. Defendant filed timely written notice of appeal.

Defendant contends the trial court erred by denying his motion to dismiss the SBM determination proceeding. Defendant argues that "the constant GPS monitoring (and the imposition of the GPS equipment for that purpose)" used in SBM violates his constitutional protections against unreasonable searches and seizures. We must disagree.

In support of his argument, defendant relies on the United States Supreme Court's decision in United States v. Jones, 565 U.S. ____,181 L. Ed. 2d 911 (2012), which held that "the Government's [warrantless] installation of a GPS device on a

target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" Id. at 181 L. Ed. 2d at 918 (footnote omitted). Defendant draws our attention to the Court's application of the plain text of the Fourth Amendment of the U.S. Constitution, which expressly "provides in relevant part that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," id. at 181 L. Ed. 2d at 917 (alteration in original) (internal quotation marks omitted), and emphasizes the Court's rejection of the applicability of the reasonable-expectation-of-privacy test articulated in Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576 (1967), to the issue before it. United States v. Jones, 565 U.S. at ____ , 181 L. Ed. 2d at 918-23.

However, in State v. Jones, ___ N.C. App.___, 750 S.E.2d 883 (2013), this Court considered the precise issue on appeal presented by defendant in the present case. See id. at 750 S.E.2d at 885-86. The State v. Jones defendant argued, as this defendant argues now, that SBM required him to be "subject to an ongoing search of his person," that such a "physical intrusion onto a person's body [wa]s far more serious than the placement of a transmitter on a car"-as was the case in United States v. Jones-and that SBM caused the State v. Jones defendant to be "subject to random searches for his location at any time, without any particularized showing of why that search need[ed] to be conducted." He further argued, as this defendant argues now, that this Court should rely on the same analysis as that articulated in United States v. Jones, one "[c]onsistent with th[e] understanding" that "[t]he

text of the Fourth Amendment reflects its close connection to property" and recognizes that "Fourth Amendment jurisprudence v1as tied to common-law trespass, at least until the latter half of the 20th century." See United States v. Jones, 565 U.S. at 181 L. Ed. 2d at 918. Nevertheless, in State v. Jones, this Court rejected defendant's argument and concluded that United States v. Jones did not control, and that our decision in State v. Martin, N.C. App. 7 35 S .E.2d 23 8 (2012),[1] required us to overrule the defendant's argument on appeal. See State v. Jones, N.C. App. at, 750 S.E.2d at 885-86.

Defendant argues that this Court erroneously relied on Martin in State v. Jones because Martin did not address the same violative intrusion challenged by the defendant in State v. Jones, and because Martin "only held that no Fourth Amendment violation had occurred as contemplated by the Katz test, while [this defendant] has contended in the case at bar that a violation has occurred pursuant to the trespassory test enunciated in [United States] v. Jones." Despite defendant's

---

[1] In Martin, this Court rejected a defendant's challenge to SBM as violative of his Fourth Amendment rights based on his assertion that SBM "would require [him] to allow DOC officials to make routine warrantless entries into his home," Martin, N.C. App. at 735 S.E.2d at 238 (alteration and omission in original) (internal quotation marks omitted), and that SBM "place[d] him in a position where he [wa]s forced to choose between forever waiving his Fourth Amendment rights or face criminal prosecution for failing to cooperation [sic] with the DOC." Id. at 735 S.E.2d at 238 (internal quotation marks omitted).

protestations to the contrary, in State v. Jones, this Court considered and rejected the argument that "if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well." State v. Jones, N.C. App. at 750 S.E.2d at 886. This Court determined that United States v. Jones was "readily distinguishable" and "d[id] not control" in that case. Id. Thus, we must conclude that, in State v. Jones, this Court "decided the same issue" that defendant presents for review in the present appeal. See In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We, as "a subsequent panel of the same court [are] bound by that precedent, unless it has been overturned by a higher court." See id. Because State v. Jones was filed after United States v. Jones, we continue to be bound by State v. Jones. See State v. Jones, 358 N.C. 473, 487, 598 S.E . 2d 125, 134 (2004) ("While a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court."). Accordingly, we conclude that the trial court did not err when it denied defendant's motion to dismiss the SBM determination proceeding and we overrule this issue on appeal.

Our disposition on this issue renders it unnecessary to address defendant's additional arguments with respect to this issue on appeal and we decline to do so.

Affirmed.

Judges McGEE and CALABRIA concur. Report per Rule 30(e).

STATE OF NORTH CAROLINA

New Hanover County

File No. 06 CRS 52283

In the Superior Court Division

State v. Torrey Grady

JUDICIAL FINDINGS AND ORDER AS TO SATELLITE-BASED MONITORING WHEN THERE HAS BEEN NO PRIOR DETERMINATION

Offense 1: 06 CRS 11573, 2d Sexual Offense, date of offense 01/27/05, G.S. No. 14-27-6

Offense 2: 06 CRS 52283, Taking Indecent Liberties with Children, date of offense 01/01/05, G.S. No. 14-202.1

Findings:

1. The defendant was convicted of a reportable conviction as defined by G.S. 14-208.6(4), but the sentencing court made no determination on whether the defendant should be required to enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes.

2. The Division of Adult Correction has made an initial determination that the offender falls into at least one of the categories requiring satellite-based monitoring under G.S. 14-208-40, and gave notice to the offender of the applicable category(ies).

3. The District Attorney scheduled a hearing in the county named above, which is the county of the defendant's residence, the Division provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the Division gave notice.

4. The defendant is a recidivist.

ORDER

Based on the foregoing findings, the Court ORDERS that:

The defendant shall enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes for the remainder of the defendant's natural life.

Date: 5/14/13

Signed: Judge Reuben F. Young

No. 14-593

In the
Supreme Court of the United States

TORREY DALE GRADY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

ROY COOPER
North Carolina Attorney General

Joseph Finarelli*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
(919) 716-6531
jfinarelli@ncdoj.gov

February 2015

* *Counsel of Record*

QUESTION PRESENTED

Whether North Carolina's satellite-based monitoring program for recidivist sex offenders constitutes an unreasonable search and seizure.

TABLE OF CONTENTS

QUESTIONS PRESENTED.. i

TABLE OF AUTHORITIES. iii

OPINIONS BELOW .. 1

STATEMENT. 1

REASONS FOR DENYING THE PETITION. 4

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT OR ANY CIRCUIT COURT.. 5

II. THE DECISION BELOW IS NOT A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED. 6

III. THE DECISIONS OF THE APPELLATE COURTS BELOW DO NOT CONFLICT WITH THE FOURTH AMENDMENT JURISPRUDENCE OF THIS COURT. 10

CONCLUSION. 14

TABLE OF AUTHORITIES

CASES

In re Civil Penalty, 379 S.E.2d 30 (N.C. 1989).. 9

New Jersey v. T.L.O., 469 U.S. 325 (1985).. 12

State v. Bowditch, 700 S.E.2d 1 (N.C. 2010). 2. 3, 6, 9, 12

State v. Dykes, 744 S.E.2d 505 (S.C. 2013) 5

State v. Grady, 762 S.E.2d 460 (N.C. 2014).. 1

State v. Grady, 2014 N.C. App. LEXIS 467 (N.C. Ct. App. May 6, 2014) 1, 9

State v. Jones, 750 S.E.2d 883 (N.C. Ct. App. 2013). 4, 9

State v. Martin, 735 S.E.2d 238 (N.C. Ct. App. 2012). 3

State v. Vogt, 700 S.E.2d 224 (N.C. 2010), *cert. denied*, 131 S. Ct. 3059 (U.S. 2011). 10

United States v. Jones, 132 S. Ct. 945 (U.S. 2012). 3, 5, 9, 10, 11

Veronia School District 47J v. Acton, 515 U.S. 646 (1995). 12

CONSTITUTIONS AND STATUTES

N.C. Const. art. I, sec. 20 .. 3

N.C.G.S. § 14-208.6(2b) (2013). 2

N.C.G.S. § 14-208.40A (2013) 7

N.C.G.S. § 14-208.40B (2013).. 2, 3

N.C.G.S. § 14-208.40B(c) (2013). 7

SECONDARY SOURCES

Robert A. Barton, et al., State of California, Office of the Inspector General, *Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions*, (October 2014), available at http://www.oigca.gov/media/reports/Reports/Reviews/OIG_Special_Review_Electronic_Monitoring_of_Sex_Offenders_on_Parole_and_Impact_of_Residency_Restrictions_November_2014.pdf... 12, 13

OPINIONS BELOW

The denial by the Supreme Court of North Carolina (Pet. App. 1a) of the Petition for Discretionary Review is reported at *State of North Carolina v. Torrey Dale Grady*, 762 S.E.2d 460 (N.C. 2014). The unpublished opinion of the North Carolina Court of Appeals (Pet. App. 3a) is reported at *State of North Carolina v. Torrey Dale Grady*, 2014 N.C. App. LEXIS 467 (N.C. Ct. App. May 6, 2014) and is also reported in table format at 759 S.E.2d 712 (2014). The Judicial Findings and Order as to Satellite-Based Monitoring When There Has Been No Prior Determination (Pet. App. 8a) issued by the trial court is unreported.

STATEMENT

Petitioner argues that the State of North Carolina's satellite-based monitoring ("SBM") program constitutes a search within the meaning of the Fourth Amendment and that the purported search is unreasonable when SBM enrollment is imposed without an express contemporaneous finding that the offender poses a threat to society. Neither the factual record in this case nor the relevant decisions by this Court supports such contentions.

Petitioner was indicted in 2006 for statutory rape and taking indecent liberties with a child. Petitioner pled guilty to one count of taking indecent liberties with a child. Petitioner was sentenced to an active term of imprisonment of thirty-one to thirty-eight months and was unconditionally released in 2009.

Petitioner was notified by the North Carolina Department of Correction in 2010 that an SBM determination hearing had been scheduled pursuant to N.C.G.S. § 14-208.40B (2013). The notice indicated that the Department had made the initial determination that Petitioner was a recidivist as defined by N.C.G.S. § 14-208.6(2b) (2013) based on both his 2006 conviction and an earlier 1997 conviction for second-degree sexual offense. Petitioner was subsequently charged with failing to maintain his address with North Carolina's sex offender registry and pled guilty to the charge. As a result, Petitioner was sentenced to an active term of imprisonment of twenty-four to twenty-nine months, from which Petitioner was unconditionally released.

Petitioner's court-appointed public defender filed a document in 2013 entitled Motion to Deny Satellite-Based Monitoring Application and Dismiss Proceeding ("the Motion"). The Motion included statements abut the legislative history of the SBM program. The Motion additionally recited various "facts" about the conditions and restrictions imposed on an offender enrolled in the SBM program, indicating that the "facts" were "described in the majority and dissenting opinions of the decision of the North Carolina Supreme Court in *State v. Bowditch*, 364 N.C. 335, [700 S.E.2d 1] ([N.C.] 2010)." The Motion also raised a litany of constitutional rights Petitioner claimed would be violated if he were ordered to enroll in the SBM program including:

> (5) That in light of the inordinately intrusive nature of satellite-based monitoring including

> (a) its continuous tracking of the offender through the GPS device and (b) its requirement that the offender permit periodic entry of his home by an employee or agent of the State for inspection and maintenance of equipment, the imposition of the monitoring upon [Petitioner] violates his rights to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article 1, Section 20 of the North Carolina Constitution. *Cf.*, *Bowditch*, 364 N.C. 335, [700 S.E.2d 1], *State v. Martin*, ___ N.C. App. ___, 735 S.E.2d 238 ([N.C. Ct. App.] 2012).

In addition, attached as an exhibit to the Motion was a form purporting to set forth the guidelines and regulations for unsupervised offenders subjected to SBM enrollment. That form was undated and unsigned and bears an issue date of "12/07."

The State conducted an SBM determination hearing pursuant to N.C.G.S. § 14-208.40B. After a brief presentation by the State of the existence of Petitioner's prior convictions, Petitioner's counsel conceded that those convictions qualified Petitioner as a recidivist under North Carolina law. Immediately thereafter, Petitioner's counsel argued that "the imposition of the GPS monitoring device itself and the 24/7 tracking is unreasonable search and seizure under both the state and federal constitutions," specifically directing the trial court's attention to this Court's decision in *United States v. Jones*, 132 S. Ct. 945 (U.S. 2012). Petitioner's counsel presented no

witness testimony and no additional documentary evidence describing anything about the equipment *currently* in use within the SBM program, the guidelines and regulations for unsupervised offenders in 2013, or the restrictions, if any, imposed on an offender as a result of enrollment in the program.

The trial court denied the Motion and ruled that Petitioner's 1997 conviction for second degree sex offense, combined with his 2006 conviction for taking indecent liberties with a child, qualified him as a recidivist. Based on this finding, the trial court ordered that Petitioner enroll in the SBM program for the remainder of his natural life. A unanimous panel of the North Carolina Court of Appeals affirmed the trial court's ruling in an unpublished opinion finding that it was bound by that court's earlier decision in *State v. Jones*, 750 S.E.2d 883 (N.C. Ct. App. 2013), which rejected the argument Petitioner raises here. (Pet. App. 3a). Petitioner sought discretionary review by the Supreme Court of North Carolina. That Court granted the State's motion to dismiss the appeal for lack of a substantial constitutional question and denied the petition. (Pet. App. 8a)

REASONS FOR DENYING THE PETITION

The decision below is not in conflict with any decision of another state court of last resort, any circuit court, or this Court. The near-complete absence of any factual record makes this case a poor vehicle for resolving the constitutional question presented. Review by this Court is not warranted.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT OR ANY CIRCUIT COURT.

Petitioner has failed to demonstrate that the Supreme Court of North Carolina's denial of discretionary review – or the decision of the North Carolina Court of Appeals rejecting a Fourth Amendment argument predicated on this Court's decision in *United States v. Jones* – conflicts with a decision of the highest court of any other State or with any federal court. Petitioner cites to no case whatsoever from **any** jurisdiction other than North Carolina in which sex offender satellite-based monitoring has been analyzed in a Fourth Amendment context since *United States v. Jones* was decided. In fact, only one other State court of last resort appears to have addressed the issue at all and, then, only in a dissenting opinion. *State v. Dykes*, 744 S.E.2d 505, 511 (S.C. 2013) (Hearn, J., dissenting).

Moreover, Petitioner has shown no reliance by any other jurisdiction on either the holding of the North Carolina Court of Appeals below or its interpretation of this Court's Fourth Amendment jurisprudence. Therefore, it would appear that any decision regarding the North Carolina courts' interpretation of the applicability of *United States v. Jones* to satellite-based monitoring for sex offenders has had no direct or indirect impact elsewhere.

II. THE DECISION BELOW IS NOT A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

A variety of factors make the instant petition a poor vehicle for resolving the question presented. Petitioner has established no factual record outlining the specifics of North Carolina's SBM program, how it operates, the equipment it uses, or the scope of any restrictions it imposes on an enrolled sex offender. Instead, Petitioner relies on the description of the program as it existed in 2009, as outlined in *State v. Bowditch*, 700 S.E.2d 1 (N.C. 2010).

In *Bowditch*, the Supreme Court of North Carolina had before it an evidentiary record consisting of live testimony from three witnesses, including the administrator of the program. *Id.* at 3. The testimony itself covered a variety of topics including, *inter alia*: (1) the equipment provided to each enrolled offender, its dimensions, and its technical aspects; (2) the extent and frequency of the maintenance required for the equipment; (3) the extent of the monitoring of an offender's movements, including how frequently the data was retrieved or the data's uses; and (4) the impact of monitoring on an offender's daily activities. *Id.* at 4-5.

Conversely, despite four years having elapsed from the issuance of the *Bowditch* opinion and the statutory

right to present evidence[1], Petitioner presented no witnesses or documentary evidence explaining the details and parameters of the current SBM program. As Petitioner notes, the entire SBM determination hearing took twenty minutes, (Pet. 4), generating an eleven-page transcript; the printed record from the appeal below consists of a mere thirty-one pages. Therefore, the "developed" record covering any particulars of the SBM program consists entirely of five-year-old information, summarized by Petitioner's trial counsel and admittedly derived entirely from the justices' various factual references from the majority and dissenting opinions in a 2010 case.

A proper assessment as to whether North Carolina's SBM program constitutes an unreasonable search and seizure in violation of the Fourth Amendment is not possible here because the factual record makes it impossible for this Court to balance the state's perceived need to monitor sex offenders and the intrusions, if any, on Petitioner and other sex offenders like him. There is no evidence whatsoever of the present-day parameters of the SBM program, no testimony about whether advances in technology have reduced the need for interruptions in the offender's life to maintain the satellite signal, no testimony about the frequency, duration, or purpose of visits by corrections officials into an offender's home, no

---

[1] *See* N.C.G.S. § 14-208.40B(c) (2013) (referencing the hearing procedures in N.C.G.S. § 14-208.40A (2013) which, in subsection (a) thereto, permit an offender to present evidence to counter that presented by the State).

testimony about the size, technical capabilities, or maintenance requirements of the equipment itself, and no information about what use, if any, North Carolina makes of the information it collects via the GPS monitoring. Under these circumstances, this Court does not have an appropriate basis to determine whether North Carolina's monitoring efforts do constitute a search and, if so, whether that search is reasonable.

Petitioner's identification of an "important federal question" implicated by North Carolina's SBM program is premised entirely on his speculation about the expanding use of GPS technology by other states to monitor offenders and the suspected unwillingness of "[l]egislators or even state judiciaries to stand in the way of public pressure to implement GPS monitoring." (Pet. 13, 14) As support for his contention, Petitioner specifically cites both the fact that North Carolina's legislature unanimously enacted the SBM program and that the author of the dissenting opinion in *Bowditch*, while running for re-election, "became the subject of a television ad accusing her of 'siding with child molesters.'" (Pet. 14, 15) Petitioner extrapolates from these events that "as GPS technology advances, the public will continue to demand its use in more – and more intrusive – searches." However, the examples Petitioner cites of the "expanding use" of the technology reflect that GPS monitoring of non-sex offenders has been in place for at least five years for domestic abusers in as many as thirteen states and for gang members in California for over a decade. (Pet. 14) Accordingly, Petitioner fails

to identify a newly-developing issue requiring this Court's intervention.

Neither of the appellate courts below actually concluded, as Petitioner claims, that "lifetime GPS monitoring of Petitioner is not an unconstitutional search." (Pet. 5) Under long-standing precedent, the North Carolina Court of Appeals concluded that it lacked the authority to overturn a ruling by a prior panel of that court on the same issue before it in the instant appeal. *State v. Grady*, 2014 N.C. App. LEXIS 467, at *4-5 (citing *In re Civil Penalty*, 379 S.E.2d 30, 37 (N.C. 1989) (holding that, where a prior panel of the North Carolina Court of Appeals has decided the same issue, a subsequent panel "is bound by that prior decision"). This is because in *State v. Jones*, 750 S.E.2d at 886, the North Carolina Court of Appeals had, in fact, previously rejected the argument that the SBM program violated the Fourth Amendment under the analytical framework announced by this Court in *United States v. Jones*. There was no independent determination of the constitutionality of the SBM program by the North Carolina Court of Appeals in this case. Furthermore, because the Supreme Court of North Carolina dismissed Petitioner's appeal on the grounds that it did not present a substantial constitutional question, that court never addressed directly the question Petitioner now asks this Court to answer.

This Court has already declined the opportunity to review the constitutionality of North Carolina's SBM program. In 2010, for the reasons set forth in its opinion in *Bowditch*, the Supreme Court of North

Carolina rejected an offender's arguments that the state's SBM program was unconstitutional because it operated as an ex post facto law. *State v. Vogt*, 700 S.E.2d 224 (N.C. 2010). This Court denied the offender's petition for certiorari. *Vogt v. North Carolina*, 131 S. Ct. 3059 (U.S. 2011).

The outdated and summary nature of the evidentiary record below and the lack of substantive analysis of Petitioner's Fourth Amendment argument by either the Court of Appeals or the Supreme Court of North Carolina makes this case an especially poor vehicle for determining whether the state's SBM program constitutes an unreasonable search and seizure in violation of the Fourth Amendment.

III. THE DECISIONS OF THE APPELLATE COURTS BELOW DO NOT CONFLICT WITH THE FOURTH AMENDMENT JURISPRUDENCE OF THIS COURT.

Assuming, *arguendo*, that this Court concludes that the courts below did expressly conclude that North Carolina's SBM program is not a search under the trespassory test outlined in *United States v. Jones*, Petitioner's identification of a conflict between those decisions and the jurisprudence of this Court is only partially complete and, at best, half right.

Without question, *United States v. Jones* held that the District of Columbia's warrantless attachment of GPS surveillance equipment to a criminal suspect's vehicle was a search under the Fourth Amendment. 132 S. Ct. at 949. However, this Court noted that "[a]

trespass on 'houses' or 'effects,' or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy." *Id.* at 951, n.5. Here, Petitioner has presented no evidence about the State's implementation of the SBM program or what information, if any, it currently obtains through the monitoring process. Accordingly, there is no basis upon which this Court can determine whether North Carolina conducts a "search" of an offender enrolled in its SBM program.

In *United States v. Jones*, this Court expressly declined to address whether the search there was reasonable, finding that the government had "forfeited" the argument by not having raised it in the lower courts. *Id.* at 954. Therefore, whether or not North Carolina's SBM program constitutes a search under the Fourth Amendment, *United States v. Jones* does not stand for the proposition that the search at issue there was unreasonable and unlawful, let alone that the presumed searches implicated by North Carolina's SBM program offend the Constitution.

Given his failure to submit any evidence or make any substantive argument to the trial court about the current operation of the SBM program or the governmental purpose behind its implementation, Petitioner instead resorts to hyperbole to characterize the severity and offensiveness of the "trespass" resulting from the monitoring inherent in the SBM program. *See, e.g.*, (Pet. 6) ("by any reckoning, the monitoring in this case is as invasive a trespass as any

that this Court has previously considered"); (Pet. 11) (because the GPS monitoring tracks "every move made by Petitioner for the rest of his life" and the State "enter[s] Petitioner's home uninvited, it is hard to imagine a more intrusive search than that experienced by Petitioner"). Petitioner buttresses these statements with repeated citations to cases addressing bodily intrusions – buccal swabs, blood draws, fingernail scrapings, breathalyzer tests – in the context of criminal investigations. (Pet. 6) (citations omitted). Moreover, Petitioner virtually ignores this Court's Fourth Amendment jurisprudence deriving from civil settings other than to say that the Fourth Amendment applies there. (Pet. 7) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 355 (1985). *But see Veronia School District 47J v. Acton*, 515 U.S. 646, 652-64, 661 (1995) (finding reasonable a school district's compulsory drug testing of urine samples of students seeking participation in school athletic programs despite the absence of individualized suspicion of drug use where the importance of the government's interest in deterring drug use by school children could "hardly be doubted").

Petitioner boldly claims that "little evidence supports the State's contention that GPS monitoring of sex offenders furthers its legitimate governmental interest of protecting the public." (Pet. 12) In support of this assertion, Petitioner cites only to the dissenting opinion in *Bowditch* decrying the absence of evidence that the SBM program prevented harm to the public, 700 S.E.2d at 14, and a recent study of California sex offenders which, based on the data compiled, questions "the popular belief that sex offenders have a high rate

of recidivism compared to other types of felons," Robert A. Barton, et al., State of California, Office of the Inspector General, *Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions*, at 18 (October 2014), *available at* http://www.oig.ca.gov/media/reports/Reports/Reviews/OIG_Special_Review_Electronic_Monitoring_of_Sex_Offenders_on_Parole_and_Impact_of_Residency_Restrictions_November_2014.pdf. (Pet. 12, 13) Petitioner conveniently ignores, however, the opportunity, if not the obligation, he had to adduce any evidence – statistical or otherwise – of the inefficacy of North Carolina's SBM program.

There is no case from this Court supporting Petitioner's assertion that GPS monitoring equipment worn by a convicted sexual offender and monitored by a state for the purpose of preventing harm to the public constitutes an unreasonable search under the Fourth Amendment. Accordingly, the decisions below are not in conflict with the jurisprudence of this Court.

In light of the nearly barren evidentiary record in this case and the resulting inability to conduct a careful analysis into whether, under the circumstances, North Carolina's SBM program constitutes an unreasonable search of a convicted sex offender like Petitioner, review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Joseph Finarelli*
Special Deputy Attorney General

February 2015

* Counsel of Record

No. 14-593

In The Supreme Court of the United States

TORREY DALE GRADY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

Lewis M. ("Luke") Everett
EVERETT & EVERETT, PLLC
2812 Erwin Rd., Suite 205
Durham, NC 27705
T: 919-382-2800
e-mail: luke@everettandeverett.com

Mark L. Hayes
LAW OFFICE OF MARK L. HAYES
P.O. Box 51387
Durham, N.C. 27717
T: 919-926-7878
email: markhayes@appealnc.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

A. The State Fails to Articulate even a Cursory Defense of the Constitutionality of its GPS Monitoring Program. 1

B. The Case Provides an Effective Vehicle for Resolving the Question Presented. 4

C. The Petition Presents an Important Federal Question. 6

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Berger v. New York, 388 U.S. 41 (1967) 3

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) 4

Kentucky v. King, 131 S. Ct. 1849 (2011) 1

New Jersey v. T.L.O., 429 U.S. 325 (1985) 2

Riley v. California, 134 S. Ct. 2473 (2014) 3, 7

State v. Bowditch, 364 N.C. 335 (2010) 2, 5

United States v. Jones, 132 S. Ct. 945 (2012) .. 3, 4, 6, 7

CONSTITUTION and STATUTES

U.S. Const. amend. IV 5

N.C. Gen. Stat § 14-208.40 *et seq* 3, 5

N.C. Gen. Stat. § 14-208-40(a) 1

N.C. Gen. Stat. § 14-208.40(c) 2

N.C. Gen. Stat. § 14-208.42 2

REPLY BRIEF FOR PETITIONER

In its Response, the State of North Carolina makes no effort to defend the constitutionality of its global positioning system (GPS) monitoring program. Instead, it argues that Petitioner's case is not worthy of the Court's attention and not a "good vehicle" for review of the question presented. In so doing, the State attempts to delegate away its responsibility to prove that it does not violate Petitioner's Fourth Amendment rights.

A. The State Fails to Articulate even a Cursory Defense of the Constitutionality of its GPS Monitoring Program.

The State could make two possible arguments to prove that its GPS monitoring program is not a violation of the Fourth Amendment: (a) that the monitoring is not a "search" for Fourth Amendment purposes; or (b) that such a search is reasonable. *See Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) ("[A]ll searches and seizures must be reasonable."). It makes neither.

First, the State never argues that the GPS monitoring program does not constitute a search. Instead, it blames Petitioner for not providing direct evidence that the State actually obtains information through its GPS monitoring program, concluding that "there is no basis upon which this Court can determine whether North Carolina conducts a 'search'" by monitoring an individual. (Resp. 11.)

The argument is bizarre. According to the statute itself, the GPS program is "designed to monitor" certain categories of offenders. N.C. Gen.

Stat. § 14-208-40(a). Specifically, the statute requires that the GPS monitoring program "provides all of the following: (1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology. (2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements." *Id.* § 14-208.40(c). To implement the program, the State has "the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed." *Id.* § 14-208.42. The idea that the State fails to obtain any information from such a program beggars belief. And the State, for its part, gives no alternative explanation.[1]

The State also implicitly questions whether the Fourth Amendment applies in civil cases, noting that Petitioner relies in part on cases dealing with physical intrusions in criminal investigations. (Resp. 12.) It writes that ". . . Petitioner virtually ignores this Court's Fourth Amendment jurisprudence deriving from civil settings other than to say that the Fourth Amendment applies there." (Resp. 12.) At no point, however, does the State dispute Petitioner's conclusion that the Fourth Amendment applies in civil settings. (*See* Resp. 10-12.) Nor could it, given this Court's definitive answering of the question. *See New Jersey v. T.L.O.*, 429 U.S. 325, 335 (1985)

---

[1] The State is careful not to classify the monitoring as a punishment. Indeed, it has previously argued that the program is not a punishment when faced with an Ex Post Facto challenge. *See State v. Bowditch*, 364 N.C. 335 (2010).

("[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities.").[2]

Failing to argue that its GPS monitoring program is not a search, the State does even less to argue that the program is "reasonable." Instead, it attempts to shift the burden, writing that Petitioner fails to prove that GPS monitoring is unreasonable. (Resp. 13 ("Petitioner conveniently ignores . . . the opportunity, *if not the obligation*, he had to adduce any evidence—statistical or otherwise—of the inefficacy of North Carolina's SBM program.") (emphasis added).)[3]

---

[2] Petitioner also questions the State's classification of its GPS monitoring program as being civil in nature. The statutes that create the program, N.C. Gen. Stat § 14-208.40 *et seq.*, are located in Article 14 of the North Carolina General States, the Article entitled "Criminal Law." Moreover, the form order promulgated by the Administrative Office of the Courts upon which Petitioner was sentenced is labeled "AOC-CR-616." "CR" is the designation for criminal forms.

[3] The State notes that *United States v. Jones*, 132 S.Ct. 945 (2012), "expressly declined to address" the question of reasonableness. (Resp. 11. (". . . *United States v. Jones* does not stand for the proposition that the search there was unreasonable and unlawful.")) However, it completely ignores Petitioner's analysis of *Riley v. California*, 134 S.Ct. 2473 (2014), *Berger v. New York*, 388 U.S. 41 (1967), and the numerous other cases cited in the Petition that deal with the issue of "reasonableness." (*See*

Setting aside the fact that Petitioner did, in fact, provide data from a comprehensive recent study on the efficacy of GPS monitoring of sex offenders, (*see* Petn. 12-13), the State's efforts at burden-shifting run directly counter to this Court's previous decisions. An individual does not bear the "obligation" to prove that a search is inefficacious; instead, the relevant question is whether the Government's search is reasonable. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . . .").

According to the State's line of reasoning, the Government can engage in any search so long as the individual is unable to affirmatively demonstrate that the search was not effective. This search-first-ask-questions-later method is precisely how GPS monitoring programs have been instituted throughout the country, and it is why such programs need to be subjected to this Court's scrutiny.

B. The Case Provides an Effective Vehicle for Resolving the Question Presented.

As it does nothing to defend the constitutionality of its GPS monitoring program on the merits, the State relies on the dual arguments that (a) the case is not a "good vehicle" for resolving the question presented and (b) the question presented does not warrant the Court's attention.

First, in arguing that this case does not provide a "good vehicle" for consideration of the

---

Petn. 7-13.) In fact, Petitioner does not cite *Jones* once in his analysis of "reasonableness." (*See id.*)

issue, the State claims that Petitioner does not present details of the GPS monitoring program other than those laid out in *State v. Bowditch*, a decision by the Supreme Court of North Carolina from 2010. It thus insinuates, without basis, that the program has changed in the past four years. But the State does not dispute any of the details regarding the GPS monitoring program set forth in the Petition, and, in fact, the descriptions of the program in *Bowditch* match Petitioner's experience. Those details are laid out in the Statement of the Case. (Petn. 4-5.)

Most importantly, though, the question presented can be answered simply by an analysis of the statute itself. No details as to the niceties of how the program is implemented can change the fact that, on its face, N.C. Gen. Stat. § 14-208.40 *et seq.* establishes a monitoring program that continuously tracks an individual's movements. By definition, such a program requires a sweeping invasion on Petitioner's "person[], house[], . . . and effects." *See* U.S. Const. amend. IV.

Ultimately, the State's reasoning is another effort at burden-shifting. Instead of using its Response as an opportunity to argue for the constitutionality of its GPS monitoring program, the State again blames Petitioner, this time for failing to properly authenticate the details of the program. Of course, the State is perfectly positioned to dispute those details, yet it fails to do so, essentially seeking to insulate its monitoring program from review by revealing as little as possible about it.[4]

---

[4] The State also notes that the North Carolina Court of Appeals and the Supreme Court of North

C. The Petition Presents an Important Federal Question.

Finally, the State argues that the Court should not grant the Petition because the North Carolina Court of Appeals' opinion and the Supreme Court of North Carolina's denial of discretionary review are not in conflict with the decision of any other state court of last resort or any circuit court. (Resp. 5.) However, Petitioner did not petition for certiorari based on a conflict between jurisdictions. Instead, Petitioner requested review on the grounds that the North Carolina courts answered an important federal question in a manner that conflicts with relevant decisions of this Court. (*See* Petn. 5-15.)

Petitioner further rejects the State's claims that the question presented is unimportant and that Petitioner's concerns are based on mere "speculation." (Resp. 8.) There simply can be no doubt that rapidly-evolving technology—including GPS monitoring—allows for surveillance that was unimaginable even ten years ago, and this Court has grappled with the implications of such technological advances in recent opinions. *See United States v.*

Carolina failed to engage in a "substantive analysis of Petitioner's Fourth Amendment argument" as a reason why the case is a poor vehicle for review. (Resp. 9-10.) It gives no precedent for the conclusion that such a failure on the part of the state courts should preclude review. Indeed, such a holding would incentivize lower courts to perform perfunctory analyses.

Jones, 132 S.Ct. 945, 954-57 (2012) (SOTOMAYOR, J., concurring) ("The net result is that GPS monitoring . . . may alter the relationship between citizen and government in a way that is inimical to democratic society." (internal quotations omitted)); *id.* at 957-64 (ALITO, J., concurring) (noting that the Court's opinion in that case was not based on "what is really important" about the case, namely, "the *use* of a GPS for the purpose of long-term tracking" (emphasis in original)); *Riley v. California*, 134 S.Ct. 2473, 2489-91 (2014) (examining the wealth of privacy interests implicated by a search of cell phone data, including access to GPS data that would allow a searcher to "reconstruct someone's specific movements down to the minute"). Indeed, the Court in *Jones* anticipated that a number of "vexing problems" concerning GPS monitoring would need to be considered "in some future case." *See Jones*, 132 S.Ct. at 954. This is just such a case.

****

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

February 18, 2015.

Lewis M. ("Luke") Everett
Counsel for Petitioner
EVERETT & EVERETT, PLLC
2812 Erwin Rd., Suite 205
Durham, NC 27705
T: 919-382-2800
e-mail luke@everettandeverett.com

Mark L. Hayes
LAW OFFICE OF MARK L. HAYES
P.O. Box 51387
Durham, NC 27717
T: 919-926-7878
e-mail: markhayes@appealnc.com